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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1868

NATIONAL GEOGRAPHIC SOCIETY,
Appellant,

v.

BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA,
Appellee.

BRIEF OF THE STATE OF NEW YORK AS *AMICUS CURIAE*

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for the State of
of New York

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

PHILIP WEINBERG
Assistant Attorney General
of Counsel

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Interest of *Amicus Curiae*

New York shares with California the type of use tax which might be jeopardized by an adverse decision here. Tax Law § 1110 imposes a compensating use tax on otherwise untaxed personal property purchased at retail. Section 1101 (b) (8) defines "vendor" in ways essentially similar to the California statute. Reversal of the holding of the court below would hamstring enforcement of this tax as applied to merchandise purchased by mail order. In New York such merchandise accounts for a substantial proportion of use taxes received by the State. Numerous out-of-state retailers have contacts in New York essentially

similar to those of appellant in this case, and a decision exempting such purchases from use tax would deprive this state of needed revenues and in addition subject New York businesses to increased untaxed competition from other states.

Opinion Below

The opinion below, dated April 1, 1976, is reported at 547 P.2d 458, 16 Cal. 3d 637, 128 Cal. Rptr. 682.

ARGUMENT

The California Supreme Court correctly held the use tax constitutional as applied to an out-of-state seller of merchandise maintaining business offices within the taxing state at which advertising for its publication is solicited and merchandise sold.

The California Supreme Court correctly held that the Society's maintenance in California of two offices from which employees solicited advertising for its magazine provided sufficient activity within California to impose use tax collection liability as to its mail order sales to California residents.

Appellant's attack on the use tax as violative of due process and the Commerce Clause is without merit. In repeated cases this Court has held that a use tax on interstate sales is valid so long as there is "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax." *Miller Bros. Co.* v. *Maryland,* 347 U.S. 340, 344-345; *Scripto, Inc.* v. *Carson,* 362 U.S. 207, 210-211. The controlling question is "whether the state has given anything for which it can ask return." *Wisconsin* v. *J.C. Penney Co.,* 311 U.S. 435, 444; *Standard Steel Co.* v. *Washington Revenue Dept.,* 419 U.S. 560, 562.

The California Supreme Court properly held that "where an out-of-state seller conducts a substantial mail order business with residents of a state imposing a use tax on such purchasers and the seller's connection with the taxing state is not exclusively by means of the instruments of interstate commerce, the slightest presence within such taxing state independent of any connection through interstate commerce will permit the state constitutionally to impose upon the seller the duty of collecting the use tax from such mail order purchasers and the liability for failure to do so." 547 P.2d 458, 462.

This principle is borne out most graphically in *Standard Steel Co.* v. *Wash. Revenue Dept., supra,* 419 U.S. 560, where this Court declared that it "verges on the frivolous" to contend that the state has not given anything for which it could ask return where the only connection of the out-of-state seller with the taxing state, other than through instruments of interstate commerce, was the presence therein of one full-time engineer who advised the purchaser with regard to its need for a certain product ordered directly by mail and shipped by common carrier. Although that case involved a business and occupation tax the constitutional principle is indistinguishable. See also *Nelson* v. *Sears Roebuck & Co.,* 312 U.S. 359; *Nelson* v. *Montgomery Ward,* 312 U.S. 373; *General Trading Co.* v. *Tax Comm'n,* 322 U.S. 335, and *Scripto, Inc.* v. *Carson, supra,* 362 U.S. 207, all use tax cases.

The existence of business offices in the taxing state provides the same degree of presence as would retail outlets or salesmen. The benefits of these offices to the seller are direct and explicit—they attract the advertising revenue on which it heavily depends. The protection furnished these offices and their employees by the state in terms of building inspection, police, transportation, fire, sanitation and other services is legally indistinguishable from that furnished a retail store or sales office, and it is far greater

than that provided by the lone employee in *Standard Steel, supra.*

Appellant's argument that its activities in California are so dissociated from its mail order activities sought to be taxed that there is no justiciable relationship between the two must similarly be rejected. In the controlling case, *Nelson* v. *Sears Roebuck & Co., supra,* 312 U.S. 359, a New York corporation had retail stores in Iowa and conducted a mail order business directly between customers in Iowa and its offices outside Iowa. Rejecting Sears' dissociation argument, this Court stated (at 364):

> "Respondent cannot avoid that burden [use tax] because its business is departmentalized. Whatever may be the inspiration of these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts."

The "dissociation" argument, properly rejected in *Sears,* is no more convincing here. The cases cited by the Society as supporting its "dissociation" claim were properly distinguished by the California Supreme Court either as involving a defect in the relationship between the state and the company to be taxed, as in *American Oil Co.* v. *Neill,* 380 U.S. 451, or involving a tax imposed on the vendor rather than on the user, as in *Norton Co.* v. *Department of Revenue,* 340 U.S. 534. *Miller Bros.* v. *Maryland,* 347 U.S. 340, a case heavily relied on by appellant, was also properly distinguished by the California Supreme Court since the out-of-state seller's only contacts with the taxing state in that case were over-the-counter out-of-state sales.

New York, like California, has a vital interest in preserving its use tax in a meaningful form by continuing its applicability to the numerous companies maintaining business offices in New York while selling by mail to New York residents. The use tax provides New York with much-needed revenue by taking away from New York inhabitants the option of avoiding sales tax by resorting to untaxed or lower-taxed out-of-state purchases, and helping keep business in New York through protection of local merchants against out-of-state competition from those who may be enabled by lower tax burdens to offer lower prices.

Were the decision of the lower court not to be upheld, the effectiveness of the use tax as a revenue producer would be seriously impaired. In this time when inflation and unemployment conspire to increase the states' burdens while their responsibilities continue, a decision undermining the effectiveness of the use tax would be devastating, encouraging price wars across state borders and depriving the states of revenues needed to maintain essential state services on behalf of their citizens.

New York also has a vital interest in preserving its sovereignty as a state within a federal system. This Court has long recognized the importance of preserving the integrity of the States. "The constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." *Texas* v. *White,* 7 Wall. 700, 725, 19 L. Ed. 227 (Chief Justice Chase), quoted in the recent *National League of Cities* v. *Usery,* —— U.S. ——, 49 L.Ed. 2d 245, 253. In recent days, this Court has reaffirmed its conviction not to allow "the National government to devour the essentials of State sovereignty." *National League of Cities* v. *Usery, supra,* —— U.S. ——, 49 L.Ed. 2d 245, 259. See also *De Canas* v. *Bica,* 424 U.S. 351.

To determine whether State sovereignty has been impaired, the controlling question is whether the States' ac-

tions are "functions essential to separate and independent existence." *National League of Cities* v. *Usery, supra,* 49 L.Ed. 2d 245, 259. There can be no doubt that the power of the State to raise revenue through taxation is at least as crucial to the separate and independent existence of the States as its power to determine the wages of its employees (upheld in *National League of Cities* v. *Usery, supra*) or its power to prohibit employers from knowingly employing unlawful aliens where citizens would be adversely affected (upheld in *DeCanas* v. *Bica, supra*).

This Court long ago held:

> "the power of taxing the people and their property is essential to the very existence of [State] government, and may be legitimately exercised on the objects to which it is applicable to the whole extent to which the government may choose to carry it * * *. It is obvious that it is an incident of sovereignty, and is coextensive with that to which it is an incident."

Kirtland v. *Hotchkiss,* 100 U.S. 491, 497, quoting *McCulloch* v. *Maryland,* 4 Wheat. 316, 428-429. See also *Bode* v. *Barrett,* 344 U.S. 583, 585.

Anything short of affirmance of the judgment below could undercut the ability of the states to maintain their solvency and provide for the needs of their citizens without protecting any even remotely commensurate right on the part of an out-of-state vendor maintaining an office in the state where the purchases are made.

CONCLUSION

The judgment appealed from should be affirmed in all respects.

Dated: New York, New York, December 21, 1976.

Respectfully submitted,

Attorney General of the State
LOUIS J. LEFKOWITZ
of New York
Attorney for the State of
of New York

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

PHILIP WEINBERG
Assistant Attorney General
of Counsel

Note: Arthur N. Malkin, legal assistant, participated in the preparation of this brief.

The States of New Mexico and South Dakota have authorized us to state that they subscribe to this brief.

TONEY ANAYA
Attorney General
State of New Mexico

WILLIAM J. JANKLOW
Attorney General
State of South Dakota